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No. _____

In The

Supreme Court of the United States

October Term, 1994

CHRIS A. CUMMINGS,
LAWRENCE M. BOWER and GEORGE B. WALLACE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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41pp

QUESTION PRESENTED

WHETHER A PRE-GUIDELINES RESTITUTION ORDER MAY BE BASED ON A COUNT OR CONDUCT OTHER THAN THE COUNT OF CONVICTION UNDER *HUGHEY v. U.S.*, 110 S.Ct. 1979.

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CITATION TO OPINIONS BELOW

The denial of the suggestion for rehearing en banc by the United States Court of Appeals for the Fifth Circuit in *U.S. v. Chris A. Cummings, Lawrence M. Bower, and George B. Wallace,* No. 91-8260, 91-8261, 91-8262 was entered without Opinion on March 15, 1995 and this order is reproduced herein as Appendix Item 2. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Chris A. Cummings, Lawrence M. Bower, and George B. Wallace,* 91-8260, 91-8261, 91-8262 was entered on February 6, 1995, and is reproduced herein as Appendix Item 1. The Findings of Fact and Conclusions

of Law by the United States District Court for the Western District of Texas El Paso Division in *U.S. v. Chris A. Cummings, Lawrence M. Bower, and George B. Wallace,* No. EP-90-CR-318 was entered on February 28, 1994, and is reproduced herein as Appendix Item 3.

JURISDICTION

The Petitioners' Suggestion for Rehearing En Banc to the United States Court of Appeals was timely filed pursuant to an order granting an extension of time, and was subsequently denied on March 15, 1995. This Petition was timely filed within ninety (90) days of that date pursuant to United States Supreme Court Rule 30.01. (Since the ninetieth day was on a Sunday, the Petition is due on Monday, June 19, 1995), Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3579 provides in pertinent part that:

"The [restitution] order may require that such defendant –

"(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

"(A) return the property to the owner of the property or someone designated by the owner; or

"(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

"(i) the value of the property on the date of the damage, loss, or destruction, or

"(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

"(2) in the case of an offense resulting in bodily injury to a victim –

"(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

"(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

"(C) reimburse the victim for income lost by such victim as a result of such offense;

"(3) in the case of an offense resulting in bodily injury [that] also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services . . . "

18 U.S.C. § 3579

STATEMENT OF THE CASE

The Appellants Cummings, Bower and Wallace were indicted on September 7, 1990 in the United States District Court for the Western District of Texas, El Paso Division, in an indictment charging various financial offenses involving their dealing with the Western Bank of El Paso. This indictment may be summarized as follows:

Count One: General conspiracy count (18 U.S.C. § 371) charging conspiracy between the Appellant Cummings, Bower, and Wallace and Barbara Chaney, President of Western Bank, and also Richard Cassidy,[1] a business associate of the Appellants. ***Indictment*, at pp. 1-6, R I 117-122.**

In the *"overt acts"* portion of this conspiracy count, the indictment describes the nominee loan to Richard Cassidy:

> ***OVERT ACTS***
>
> 1. On or about June of 1985, the Defendant, LAWRENCE B. BOWER; and employee of ResortAmerica, with the agreement of CHRIS A. CUMMINGS, brought Richard T. Cassidy to Western Bank to meet with Defendant BARBARA R. CHANEY, President and Chief Executive Officer of the Bank, for the purpose of entering into a "nominee" loan to benefit ResortAmerica.
>
> 2. On June 27, 1985, Richard T. Cassidy, pledged section 12 of block 5 of the Public

---

[1] Exercising its discretion, the Government never charged Richard Cassidy, business associate of the Appellants, with any offense.

School Land to Western Bank for a $645,000.00 loan, authorized by Barbara R. Chaney.

3. On June 27, 1985, Richard T. Cassidy signed a Declaration of Trust, for the benefit of CCG Investment declaring that in the even of the repayment of the $645,000.00 loan at Western Bank, the pledged land, section 12, block 5 of the Public School Land, would revert to CCG, a company owned by Chris A. Cummings and George B. Wallace.

4. On or about July 31, 1985, indicted co-conspirator Richard T. Cassidy, endorsed a cashier's check in the amount of $645,000.00 issued by Western Bank, representing the proceeds of the "nominee" loan authorized by Defendant Barbara R. Chaney, causing the check to be deposited to the ResortAmerica account at Texas Commerce Bank. The endorsement read: "For deposit only, 191-141-9, ResortAmerica Corporation." and was followed by Cassidy's signature.

***Indictment,* at pp. 5-6 R I 121-122**

***Count Two*:** False bank record count (18 U.S.C. § 1005 and § 2) charging Barbara Chaney, President of Western Bank aided and abetted by Richard Cassidy. ***Indictment,* at pp. 6-7, R I 122-123**

***Count Three*:** Misapplication of bank monies count (18 U.S.C § 656 and § 2) charging Barbara Chaney, President of Western Bank, aided and abetted by Appellant Bower. **[Representing the Richard Cassidy nominee loan which was the subject of the restitution order].** ***Indictment,* at pp. 7-8, R I 123-124**

***Count Four*:** False bank entry count (18 U.S.C. § 1005 and § 2) charging Barbara Chaney, President of

Western Bank, aided and abetted by Appellant Bower. ***Indictment,* at pp. 8-9, R I 124-125**

***Count Five*:** Misapplication of bank monies count (18 U.S.C. § 656 and § 2 charging Barbara Chaney, President of Western Bank, aided and abetted by Appellant Bower. ***Indictment,* at pp. 9-10, R I 125-126**

***Count Six*:** False bank entry count (18 U.S.C. § 1005) charging Barbara Chaney, President of Western Bank. ***Indictment,* at pp. 10-11, R I 126-127**

***Count Seven*:** General conspiracy count (18 U.S.C. § 371) charging the Appellants Cummings, Wallace and Bower with "others known and unknown." ***Indictment,* at pp. 11-14, R I 127-130**

In its "overt acts" this general conspiracy count describes the false financial statements of the Appellants Cummings, Wallace and Bower.

> 2. On or near March 1, 1986, Chris A. Cummings prepared and caused to be prepared and submitted to Western bank, a "Statement of Financial Condition" that was false and fraudulent in that it showed Chris A. Cummings' total liabilities and net worth as $27,593,690.00.
>
> * * *
>
> 4. On or near March 1, 1986, Lawrence M. Bower prepared and caused to be prepared and submitted to Western Bank, a "Statement of Financial Condition" that was false and fraudulent in that it showed Bower's total liabilities and net worth as $14,503,376.00.
>
> * * *

> 8. On or near March 1, 1986, George B. Wallace prepared and caused to be prepared and submitted, to Western bank, a "Statement of Financial Condition" that was false and fraudulent in that it showed Wallace's total liabilities and net worth as $24,907,974.00. All in violation of Title 18, United States Code, Section 371.
>
> ***Indictment*, at pp. 13-14, R I 129-130**

And in the "manner and means" of this conspiracy count the ***Indictment*** describes the purposes of these false financial statements of Appellants Cummings, Bower, and Wallace as follows:

> 1. Between the years 1983 and 1987, Chris A. Cummings, Lawrence M. Bower and George B. Wallace periodically submitted financial statements to Western Bank to be made part of their credit and loan files. These statements were required by Western Bank to be filed at least one time each year, to be used by the bank in determining the individual credit worthiness of each Defendant and of their jointly and separately owned companies.
>
> 2. Western Bank used the financial statements submitted by the Defendants herein to make loans, extend and renew loans, change loans, approve changes of collateral pledged for loans and extend letters of credit to Chris A. Cummings, Lawrence M. Bower and George B. Wallace
>
> ***Indictment*, at pp. 12-13 R I 128-129**

Count Eight: False personal financial statement on a loan [March 1, 1986] (18 U.S.C. § 1014), charging Appellant Cummings. ***Indictment*, at pp. 14-15, R I 130-131**

Count Nine: False personal financial statement on a loan [March 1, 1986] (18 U.S.C. § 1014), charging Appellant Bower. ***Indictment,*** **at pp. 15-16, R I 131-132**

Count Ten: False personal financial statement on a loan [March 1, 1986] (18 U.S.C. § 1014), charging Appellant Wallace. ***Indictment,*** **at p. 16-17, R I 132-133**

Indictment:

The basis of indictment is patently simple. When their business enterprise, "ResortAmerica," was over its lending limit at Western Bank, the Appellants Cummings, Bower, and Wallace together with their business associate Richard Cassidy, got together with Barbara Chaney, President of Western Bank, to restructure the loans so as to provide the Appellants more money. The method was to have Appellants Cummings, Bower, and Wallace, and their associate Richard Cassidy to temporarily split up the assets of ResortAmerica among themselves and apply for personal "nominee" loans based on their personal financial statements, see Conspiracy Count One and Conspiracy Count Seven. ***Indictment,*** at pp. 1-6, R I 117-122, at pp. 11-14, R I 127-130.

However simple the charges were, the case speedily complicated itself upon the Appellants' pleas of guilty. The Appellants Cummings, Bower and Wallace pled guilty pursuant to a plea bargain to Counts Eight, Nine, and Ten respectively, which dealt with ***their personal financial statements*** ("false and fraudulent [as to] . . . net worth," ***Indictment,*** p. 13-14, R I 129-130, which were submitted in connection with their personal "nominee" loans. The plea agreement was silent as to restitution

except for the proviso: "The United States Attorney . . . agrees to . . . refrain from commenting on or recommending any amount of restitution be made, if any, but, either leave the determination of restitution entirely to the Court if the Court so chooses to impose it," ***Plea Bargain,*** at paragraph five, R I 46-47. So far so good. However, after the Court accepted the plea agreements and the guilty pleas of the Appellants Cummings, Bower, and Wallace, it was learned that no losses accrued to Western bank from ***their personal "nominee" loans which*** are covered by the false financial statement charges contained in Counts Eight, Nine and Ten of the Indictment, see ***Indictment,*** at pp. 14-17, R I 130-133. The only losses accruing to Western Bank were *from the personal nominee loan and false personal financial statement of Richard Cassidy* who because he was not charged with anything could not be ordered to pay restitution. Thus began the tortured attempt of the District Court and the Government to hold the Appellants Cummings, Bower, and Wallace liable for the Cassidy Loan of Western Bank described in the general conspiracy charged set forth in Count One of the Indictment.

> Q. [DEFENSE COUNSEL]: Now, Agent, when was this first Cassidy loan made?
>
> A. [FBI AGENT VAN GANT]: The first Cassidy loan was made on June 27th, 1985.
>
> Q. And that is exactly the way it is described in the indictment, is it not, in a single count?
>
> A. Yes.

Q. Okay. There is count charging these three defendants with aiding and abetting or whatever with Mr. Cassidy in dealing in a crime involving this loan, is that right?

A. Yes.

Q. Okay. Now, did they plead guilty to that count?

A. They pled guilty to submitting false financial statements.

Q. Did they plead guilty to the count involving the Cassidy loan?

A. The count you are describing, no, they did not.

R I at p. 108

Since Count One was not a Count of Conviction as to any of these Appellants, the result ran afoul of the specific holding of ***U.S. v. Hughey,*** 495 U.S. 411 (1990) and ultimately brought us here.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

WHETHER A PRE-GUIDELINES RESTITUTION ORDER MAY BE BASED ON A COUNT OR CONDUCT OTHER THAN THE COUNT OF CONVICTION UNDER *HUGHEY v. U.S.*, 110 S.Ct. 1979

A. *Specific Reasons for Granting the Writ.*

The Petitioners seek Certiorari pursuant to U.S. Sup. Ct. Rule 17.1(c) which provides as basis for certiorari jurisdiction when a Court of Appeals "has decided a

federal question in a way in conflict with applicable decisions of the Court." The conflict in this case is readily apparent, ***U.S. v. John Doe,*** 465 U.S. 605, 610 (1984). Alternatively, the Petitioner argues that this conflict with a decision of this Court, ***Hughey v. U.S.,*** 110 S.Ct. 1979 (1990), arises because the United States Court of Appeals for the Fifth Circuit has seriously misconstrued ***Hughey, Upshaw v. U.S.,*** 335 U.S. 410 (1948); ***Wilkinson v. U.S.,*** 365 U.S. 399, 401 (1961), so as to allow pre-guideline restitution ordered for Counts and Conduct other than the Counts and Conduct involved in the Count of Conviction:

> More significantly, § 3580(a)'s catchall phrase does not reflect a congressional intent to include in the restitution calculus losses beyond those caused by the offense of conviction. Section 3580(a) sets forth the considerations for "determining whether to order restitution under section 3579 of this title and the amount of such restitution." The first such consideration is "the amount of loss sustained by any victim as a result of the offense." This language suggests persuasively that Congress intended restitution to be tied to the loss caused by the offense of conviction. Indeed, had Congress intended to permit a victim to recover for losses stemming from all conduct attributable to the defendant, including conduct unrelated to the offense of conviction, Congress would likely have chosen language other than "the offense," which refers without question to the offense of conviction. See ***supra,*** at ___.
>
> * * *
>
> Section 3580(a) hence confirms, rather than undermines, our conclusion that the loss caused

> by the conduct underlying the offense of conviction establishes the outer limits of a restitution order.
>
> ***Hughey,*** 110 S.Ct. at 1983-84

The Fifth Circuit avoided ***Hughey*** by a transparent maneuver which stands ***Hughey*** on its head. The Fifth Circuit holds that in Counts charging a false personal financial statement you are not only liable for restitution for losses accruing from the personal loan for which the personal financial statement was made, but you are liable for restitution for any financial or other illegality which a person could have disclosed in such a financial statement, ***U.S. v. Cummings, et al.,*** Slip Opinion, at pp. 6-7. Failure to confess illegality becomes causation because upon confession a financial institution might ameliorate the loss. Thus, according to the Fifth Circuit, the fact that no losses accrued from the Appellants' personal loans for which the personal financial statements were presented to the financial institution is beside the point. This effectively bars the application of the ***Hughey*** limitation of restitution to any false financial statement case, because a person could be found liable not only for the loan dealt within the count of conviction, but also from any financial irregularity or illegality which could possibly have been confessed in the financial statement. Such an approach stands ***Hughey*** on its head and actually imposes a greater latitude of liability for restitution than that contained in the ***Federal Sentencing Guidelines,*** § 5E1.1, which does not mention "opportunity to confess" as a basis of liability. Counsel would argue that the results of such a theory of liability would be absurd. A person convicted of a threatening note for which no harm other

than the note itself resulted could be held liable for the harm of extraneous offenses which the person could have forewarned the Government in his note because had they been so warned they could have moved to prevent the harm. Without being facetious, it is safe to say that this "opportunity to confess" has no inherent limitations because it is liability based on omission which is everything other than that set forth.

Here, the Appellants pled guilty to Counts (Eight, Nine and Ten) involving personal financial statements and personal loans for which there were no losses. the Counts involving the general conspiracies (Counts One and Seven) which dealt with the Cassidy personal loan and the Cassidy personal financial statement which did result in losses were ***dismissed*** on Motion to the Government. There is no quarrel with the premise that the Government could have imposed liability for restitution by any of several means: (1) by convicting the Appellants of a general conspiracy Count which included the Cassidy Personal Financial Statement and the Cassidy personal nominee loan; (2) by charging the Appellants with aiding and abetting Cassidy in the presenting of the Cassidy false financial statement and in securing statement and in severing the Cassidy loan, etcetera. One simply cannot reach that goal under ***Hughey*** by charging the Appellants with false personal financial statements submitted in connection with their own personal loans. The Courts of Appeal in amplifying ***Hughey*** have made it clear that the fact that other losses are part of the same conspiracy, some course of conduct, same general scheme, etcetera, is besides the point, ***U.S. v. Cockerham,*** 919 F.2d 286 (5th Cir. 1990); ***U.S. v. Jewett,*** 978 F.2d 251 (6th Cir. 1992); ***U.S.***

v. Clark, 931 F.2d 292 (5th Cir. 1991). Here, the Fifth Circuit avoided *Hughey* and did so by use of a dubious theory which is pernicious in itself as well as destructive of this Court's reasoning in *Hughey*.

The Petitioner would respectfully suggest that a summary disposition of this case reversing the erroneous opinion the Fifth Circuit would reaffirm *Hughey* and reestablish the uniformity of law as to this question, see *Hughey*, generally.

B. Argument on the Merits

The Fifth Circuit Court of Appeals in this case has chosen to ignore the teachings of *United States v. Hughey*, 495 U.S. 411 (1990) in favor of spurious theories of restitution liability which were explicitly or implicitly eschewed by the United States Supreme Court in *Hughey*, and by other opinions issued by various Courts of Appeal. Looking at the Fifth Circuit opinion one sees that the Court found a basis for liability for restitution in three tersely written paragraphs at the conclusion of the opinion.

> We review factual findings for clear error. It is undisputed that defendants pled guilty to submitting false financial statements to Western Bank in March 1986. The Cassidy loan was nominally made to Cassidy, but there is not doubt that the defendants received the proceeds. They knew that they could not borrow money themselves from Western, because they would have exceeded the aggregate borrowing limits set by the Texas Department of Banking ("TDB"). Defendants, nevertheless, pledged to Cassidy

> that they would pay the loan amount. Defendants, in fact, reported this obligation to the IRS.
>
> Western Bank, was examined by the TDB and the FDIC in June 1986. It was not error for the district court to have determined that the Cassidy loan would not have been renewed had the defendants not filed false financial statements that did not indicate the true nature of the Cassidy obligation.
>
> The district court made an independent determination of restitution without a recommendation from the government, which was plainly contemplated by the plea agreement. Moreover, the restitution was ordered for losses that occurred as a direct result of the offense to which the defendants pled guilty. Accordingly, we AFFIRM.
>
> ***U.S. v. Cummings, Bower, and Wallace***
> **Slip Opinion at pp. 7-8**
> **(5th Cir. 1995)**

Dissecting these paragraphs we find the following erroneous premises:

> The Cassidy loan was nominally made to Cassidy, but there is no doubt that the defendants received the proceeds. They knew that they could not borrow money themselves from Western, because they would have exceeded the aggregate borrowing limits set by the Texas Department of Banking ("TDB"). Defendants, nevertheless, pledged to Cassidy that they would pay the loan amount. Defendants, in fact, reported this obligation to the IRS.

> ***U.S. v. Cummings, Bower, and Wallace***
> **Slip Opinion, at p. 7**
> **(5th Cir. 1995)**

These holdings merely state that the Appellants' were ***guilty*** of complicity in the offense (the Cassidy loan) which directly gave rise to the loss on which the restitution is based, and that they received the proceeds. These facts are totally immaterial under ***Hughey***. In ***Hughey***, the accused was also "guilty." Actual guilt is irrelevant under ***Hughey*** when we move away from the Count of Conviction.

Subsequently, the panel went on to state its other erroneous premise:

> It was not error for the district court to have determined that the Cassidy loan would not have been renewed had the defendants not filed false financial statements that did not indicate the true nature of the Cassidy obligation.
>
> ***U.S. v. Cummings, Bower, and Wallace***
> **Slip Opinion at p. 7**
> **(5th Cir. 1995)**

This basis for liability is what counsel will call: "The missed opportunity to confess" theory which is unsupported by any case law and which is implicitly rejected by the opinions of this Court in ***Hughey;*** and by the opinions of the Fifth Circuit. In ***United States v. Clark,*** 931 F.2d 292 (5th Cir. 1991) and ***United States v. Cockerham,*** 919 F.2d 286 (5th Cir. 1990); and by the opinions of other circuits, see ***United States v. Jewett,*** 978 F.2d 251 (6th Cir. 1992). All of these cases involved unsuccessful Government attempts to find restitution liability based on Counts other than the Count of conviction because such

Counts were related or part of the same general scheme or conspiracy.

The Fifth Circuit theory of liability is based on the factual premise that the Appellants ***could have revealed*** the true nature of the Cassidy nominee loan in their financial statements. The financial statements in question were basically one page documents listing general assets and liabilities without any discussion of specific asset characteristics or the details or number of any particular loans, for example:

LAWRENCE M. BOWER
STATEMENT OF FINANCIAL CONDITION
MARCH 1, 1986

LIABILITIES:

Accounts Payable	$ 3,500
Mortgage Payable – Residence	103,600
Notes Payable – Deerfield Ranch	**930,350**
Note Payable – Helicopter Aviation Corp.	48,123
Notes Payable – Land Sales Operation	1,014,882
Notes Payable – Tiara Project	566,667
Note Payable – Otero County	466,660
Note Payable – BBC Investments	469,900
TOTAL LIABILITIES	$ 3,603,681
NET WORTH	10,446,695
TOTAL LIABILITIES & NET WORTH	$14,503,376

***Defendant's Exhibit* 2, 3 and 4**
R I at pp. 108-110

One will note that the asset (Deerfield Ranch) and the indebtedness on the asset (Deerfield Ranch) is shown on all three statements. The Government contends that the

indebtedness should have been further described, for instance like "$685,000 of this indebtedness is from an illegal nominee loan made to Richard Cassidy in our behalf," and that because the Appellants did not confess the crime in detail in their statements, that lack of confession caused the losses occasioned by the renewal of the Cassidy loan. As previously noted the Appellants would have had to depart from this standard form to offer details of the Cassidy loan. In the Fifth Circuit's view, the Appellants could have used this financial statement to incriminate themselves by specifically revealing the nominee status of the Cassidy loan and thus prevented renewals of the Cassidy loan. According to the Fifth Circuit, failure to specifically confess their wrongdoing as to the Cassidy loan in financial statements submitted in connection with their own personal loans resulted in "losses that occurred as a direct result of the offense to which the defendants pled guilty." ***U.S. v. Cummings, Bower, and Wallace,*** Slip Opinion, at p. 8 (5th Cir. 1995).

The Appellants would argue that this spurious basis of restitution liability is not only not supported by any case law, but that this basis indicates that other cases such as ***United States v. Clark,*** 931 F.2d 292 (5th Cir. 1991) was wrongly decided. In that case, the Defendant pled to a few of many false financial statements.

> Clark only pled guilty to four counts of aiding and abetting false statements to a federally insured savings and loan institution. According to the plea agreement and information these charges only applied to 4 out of 22 loan applications which represented the funding for the Brodsky tract. Even though the government and the court consented to the plea agreement, the

> court required restitution based upon losses suffered from the entire project.
>
> * * *
>
> The parties agreed, after negotiations, to what the charges would be; to allow the government to get more than originally was contemplated due to some introductory language runs contrary to Hughey and Cockerham. Clark only pled guilty to four counts; he may be held liable for restitution only for losses arising from those counts.
>
> ***United States v. Clark,***
> **931 F.2d 292 (5th Cir. 1991)**

Using the Government's dubious theory, the false statements which the Defendant in that case pled guilty to could very well have caused the making (or renewals) of the other loans because if the Defendants disclosed the illegality of these other loans in their financial statements (submitted in connection to the loans involved in the specific count of conviction), then the lending institutions would not have made or renewed such loans. Thus, the Fifth Circuit would reason that the losses were directly caused by the failure to confess as in our case, and the reversals in these cases were wrongfully given.

The panel seems to ground their decision on the fact that the Appellants deserve to pay restitution because the Appellants were in fact very guilty of the conduct which resulted in the "Cassidy Loan" and the "Cassidy Loan" loss. As ***Hughey*** teaches us, while such sentiments may be laudable, they are beside the point. Counsel is sure that this Court is aware of that general principle:

The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:

" 'The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.' R. Bolt, A man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967)."

Weinberger v. Romero Barcelo,
456 U.S. 305, 335, FN20

The restitution order here was morally right, but legally wrong. Since this is a Court of Law as against a Court of Right and Wrong, the restitution order should be vacated.

CONCLUSION AND PRAYER

WHEREFORE THE ABOVE PREMISES CONSIDERED Petitioners respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; thereafter remand this cause

to the United States Court of Appeals for the Fifth Circuit with instructions to vacate the order of restitution.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8260
No. 91-8261
No. 91-8262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHRIS A. CUMMINGS,
LAWRENCE M. BOWER, and
GEORGE WALLACE,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(EP-90-CR-318(B)(2), EP-90-CR-318(B)(3) &
EP-90-CR-318(B)(4))

(Filed Feb. 6, 1995)

Before HIGGINBOTHAM, SMITH, and PARKER, Circuit Judges. JERRY E. SMITH, Circuit Judge:*

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Chris A. Cummings, Lawrence M. Bower, and George Wallace appeal their sentences imposed following pleas of guilty. Concluding that the district court did not err, we affirm.

I.

Defendants pled guilty to submitting false statements to Western Bank in El Paso, Texas, for the purpose of influencing the bank's decision to extend credit, in violation of 18 U.S.C. § 1014. Defendants, along with Barbara Chaney, originally were indicted in 1990 for various instances of bank fraud. Each defendant pled guilty to one of the ten counts in the indictment and was sentenced to two years' imprisonment, $1,926,681 in restitution, five years' supervised release, and a $50 special assessment. The amount of restitution later was reduced to $1,091,285.[1]

The defendants timely appealed their original sentence. They alleged that the restitution amount was not reasonably related to the offense of conviction and that the district court had erred in failing to enter findings that specified the relationship between the sentence and the loss that gave rise to it. The government agreed with the latter claim and filed a motion to remand for restitution findings.

The government's motion was granted by this court. The district court entered findings of fact and conclusions of law in January 1992 in accordance with the remand.

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[1] For a full disoussion of the details of the scheme in this case, *see United States v. Chaney*, 964 F.2d 437 (5th Cir. 1992).

The defendants then filed a motion for a second remand on the ground that the findings were issued without prior notice or a hearing. We remanded again, with an order that an evidentiary hearing be held for the purpose of establishing the legal basis for the previous restitution award. The government's conduct at this hearing, which took place in October 1993, and the restitution award itself, are the subjects of this appeal.

II.

Defendants' first claim is that the government violated the express terms of the plea agreements at the evidentiary hearing. The provision in question states that the United States, in exchange for the guilty plea, agrees, among other things, to:

> Refrain from commenting on or recommending any amount of restitution to be made, if any; but, rather leave the determination of restitution entirely to the Court if the Court so chooses to impose it.

Whether the government breached the agreement is a question of law. *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir. 1993). Defendant must prove by a preponderance of the evidence the underlying facts that establish a breach. *United States v. Watson*, 988 F.2d 544, 548 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994). The important question is "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." *Valencia*, 985 F.2d at 761. Defendants now ask that the district court specifically

enforce the plea agreement by forbidding the government from commenting on the issue of restitution.

The government might conceivably have "commented" on restitution in two ways. The first was when the government responded to the defendants' arguments, made in a FED. R. CRIM. P. 35 motion after the original sentence was pronounced, that no legal basis for restitution existed. The government argued that the facts of the case supported the court's restitution order. Second, at the evidentiary hearing that was called to establish a legal basis for the restitution award, the government called an FBI agent to supply testimony to support the court's restitution ruling.

Defendants argue that by virtue of these instances, the government has "taken a position" on restitution, in violation of the plea agreement. The reasonable understanding of the agreement, however, was not breached. The specific language of the provision prohibits "commenting on" or "recommending" any amount of restitution to be made, "if any." The next clause indicates, instead, that the "determination" of restitution is left entirely to the court. It seems plain that the agreement was meant to prohibit the government from suggesting to the court that restitution be ordered and that a certain amount be compelled.

The government did not make a restitution recommendation at the sentencing. The court, on its own, determined that restitution should be made. The later "comments" by the government were intended to support, against attack by the defendants, the court's prior determination of a restitution amount. The government

never made an independent suggestion that restitution be made with respect to these defendants.

The court chose to impose the restitution and selected the amount itself. The later government evidence offered to support the validity of the order did not violate the plea agreement provision.

III.

The second issue on appeal is the defendants' challenge to the amount of the restitution assessed. They argue that the court's sentence is contrary to *Hughey v. United States*, 495 U.S. 411 (1990). According to *Hughey*, restitution under the Victim and Witness Protection Act of 1982 ("VWPA") is limited to losses caused by the conduct underlying the offense of conviction. *Id.* at 418.

The defendant in *Hughey* pled guilty to one count of credit card fraud but was ordered to pay restitution for losses relating to twenty-one other instances of credit card theft and unauthorized usage. The Court reversed and stated that the restitution should be limited to the specific losses that resulted from the offenses that formed the basis for the one count of fraudulent usage of a credit card to which the defendant pled guilty. *Id.* at 422.[2]

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[2] The holding of *Hughey* was limited by the Crime Control Act of 1990, as we indicated *United States v. Arnold*, 947 F.2d 1236 (5th Cir. 1991). Judges can order restitution "in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3). In *Arnold*, the defendant pled guilty to only one count of an indictment but explicitly aknowledged that the crime of conviction included 14 other counts. The restitution

Defendants argue that the restitution order was excessive in light of *Hughey*. Under the plea agreement, the defendants agreed to admit to the following:

> On or about March 1, 1986, in the Western District of Texas, I submitted a false statement and report, a document entitled, "Statement of Financial Condition," to Western Bank, a financial institution whose accounts were insured by the Federal Deposit Insurance Corporation for the purpose of influencing Western Bank, upon an application, advanced commitment and loan, and on any change, extension, renewal, deferment of action or otherwise on the same, knowing that the statement was false and fraudulent, in that it did not demonstrate a true and accurate depiction of my credit worthiness.

The district court ordered the defendants to pay restitution based upon a loan (the "Cassidy loan") that Western Bank had made to the defendants and that subsequently went unpaid.

The government alleges, and the district court found, that the Cassidy loan was renewed as a direct result of the false statements the defendants have admitted to making. Defendants argue that the Cassidy loan has nothing to do with the false statements and, therefore, that the court, bound by *Hughey*, could not order restitution based upon that loss.

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amount was based upon all of the criminal conduct. 947 F.2d at 1238. In the present case, there is no indication in the plea agreement that the defendants acknowledged any guilty conduct other than the one count of making false statements. As a result, we are still bound by *Hughey*. The government says as much as well by stating, in its brief, that "*Hughey* applies."

The Cassidy loan was made to Richard T. Cassidy by Western Bank on June 27, 1985, for the benefit of the defendants and their related business entities. The court found that the land used to collateralize the loan was actually owned by the defendants as reflected on their own financial records. Moreover, the court found that the Cassidy loan was always the debt of the defendants, as reflected in the financial records that they submitted to their accountant.

The false statements to Western Bank occurred on March 1, 1986. The court found that one of the false statements was the defendants' failure to state their liability for the Cassidy loan. According to the district court, this failure to state liability resulted in the subsequent renewal and extension of the original Cassidy loan on May 14, 1986; June 27, 1986; and September 30, 1986. The Court also found that had the true nature of the Cassidy loan been revealed, the bank would not have approved the extension of the note, as it would be violative of the bank's "loans to one borrower" policy and of federal and state regulations. Finally, the court concluded that the renewal and/or extension of the Cassidy loan resulted in a loss to the FDIC in the amount of $1,141,285.

We review factual findings for clear error. It is undisputed that defendants pled guilty to submitting false financial statements to Western Bank in March 1986. The Cassidy loan was nominally made to Cassidy, but there is no doubt that the defendants received the proceeds. They knew that they could not borrow money themselves from Western, because they would have exceeded the aggregate borrowing limits set by the Texas Department of

Banking ("TDB").[3] Defendants, nevertheless, pledged to Cassidy that they would pay the loan amount. Defendants, in fact, reported this obligation to the IRS.

Western Bank was examined by the TDB and the FDIC in June 1986. It was not error for the district court to have determined that the Cassidy loan would not have been renewed had the defendants not filed false financial statements that did not indicate the true nature or the Cassidy obligation.

IV.

The district, court made an independent determination of restitution without a recommendation from the government, which was plainly contemplated by the plea agreement. Moreover, the restitution was ordered for losses that occurred as a direct result of the offense to which the defendants pled guilty. Accordingly, we AFFIRM.

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[3] In the spring of 1985, Chaney realized that a bank examination was imminent and that defendants had already borrowed enough to exceed the legal limitations. As a result, she determined that certain outstanding loans owed to Western by defendants had to be restructured. Cassidy agreed to allow his name to be used but did not receive any of the proceeds. *See Chaney*, 964 F.2d at 441-42.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

91-8260
Nos. 91-8261
91-8262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRIS A. CUMMINGS,
LAWRENCE A. BOWER and
GEORGE WALLACE,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/06/95, 5 Cir., ___, ___ F.3d ___)

(March 15, 1995)

Before HIGGINBOTHAM, SMITH, and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and

Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE
COURT:
/s/ Illegible
United States Circuit
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	
v.	)	EP-90-CR-318
CHRIS A. CUMMINGS, LAWRENCE M. BOWER, and GEORGE B. WALLACE	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(Filed Feb. 28, 1994)

IN ACCORDANCE WITH INSTRUCTIONS FROM THE FIFTH CIRCUIT, this Court held an evidentiary hearing on October 20, 1993 in order to address the validity of the restitution assessed against the above named Defendants and, specifically, the relationship between the offense for which the above-named Defendants were convicted and the restitution award entered in the cause. Before entering its findings and conclusions as a result of that evidentiary hearing, a brief history of the case is in order.

On January 25, 1991, pursuant to a plea agreement, the above named Defendants each pleaded guilty to one count of making a false financial statement to a Federal Deposit Insurance Corporation ("FDIC") insured bank, in violation of 18 U.S.C. § 1014. On or about February 22, 1991, the Court sentenced Defendants to a period of

imprisonment followed by probation and ordered restitution in the amount of $1,926,681.00. On May 22, 1991, the sentence was amended to provide for restitution in the total amount of $1,141,285.00. That amount reflected an outstanding and unpaid balance of $645,000.00 in principal and $496,285.00 in interest, as evidenced by FDIC records as of February 12, 1991, on a "nominee" loan to Richard T. Cassidy (the "Cassidy loan").

On appeal, Defendants challenged the restitution award alleging that the amount of restitution was not reasonably related to the offense of conviction and that this Court erred in failing to enter findings specifying the relationship between the amount of restitution and the loss which gave rise to the restitution assessment. On November 17, 1991, the Government filed a motion to remand this cause for restitution findings since evidence admitted in the trial of Defendants' co-defendant, Barbara Chaney, established that the restitution assessment arose from specific conduct forming the basis of the offense of conviction of the above-named Defendants. On December 28, 1991, the Fifth Circuit granted the Government's motion to remand for the entry of findings regarding the restitution assessment, and on January 27, 1992, this Court, in accordance with that remand, entered its Findings of Fact and Conclusions of Law on Remand.

The Defendants filed a Joint Motion for Second Remand in February of 1992, on this grounds the Court's Findings of Fact and Conclusions of Law were issued without prior notice and without a hearing. Although the Court has no record of a second remand, the Court has been assured by the Fifth Circuit the case was remanded to this Court for an evidentiary hearing and concomitant

findings and conclusions. In the meantime, on August 30, 1993, the Court again amended the amount of restitution to reflect, as an offset to the originally ordered restitution amount, the payment of $50,000.00 by Richard T. Cassidy on the note held by the FDIC. The new amount of restitution was ordered to be $1,091,285.00, less any amounts already paid by the Defendants.

As noted above, an evidentiary hearing was conducted on October 20, 1993, in accordance with the second remand of this cause from the Fifth Circuit. After considering the evidence presented, the proffered exhibits and affidavits, the arguments of counsel, and the controlling legal authorities, this Court makes the following Findings of Fact and Conclusions of Law as required by the Fifth Circuit.

1. On June 27, 1985, Barbara R. Chaney, President and Chief Executive Officer of Western Bank in El Paso, Texas, and Defendants Lawrence M. Bower, Chris A. Cummings, and George Wallace authorized the funding of a "nominee" loan in the amount of $645,000.00 to Richard T. Cassidy for the benefit and accommodation of Defendants Chris A. Cummings, Lawrence M. Bower, George Wallace, and their related business entities, the Cummings Group and ResortAmerica Corporation.

2. The land used to collateralize the Cassidy loan was actually owned by the Defendants as was reflected in their own financial records submitted to their accountant for the preparation of their 1984, 1985, and 1986 tax returns.

3. The Defendants received the use and benefit of the proceeds of the June 27, 1985, Cassidy loan in the amount of $645,000.00.

4. The debt represented by the Cassidy loan was always the debt of the Defendants as is reflected in their own financial records submitted to their accountant for preparation of tax returns.

5. Barbara R. Chaney, President and Chief Executive Officer of Western Bank in El Paso, authorized the funding of the June 27, 1985, "nominee" loan in the amount of $645,000.00 to Richard T. Cassidy based upon the financial resources and credit worthiness of Defendants Chris A. Cummings, Lawrence M. Bower, and George Wallace.

6. On or about March 1, 1986, Defendants Lawrence M. Bower, Chris A. Cummings, and George Wallace knowingly and willfully made false and fraudulent financial statements to Western Bank, a financial institution whose accounts were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing Western Bank upon an application, advance, commitment and loan, and on any change, extension, renewal, or other action on the same.

7. One of the false statements made by Defendants to Western Bank is their failure to state their liability for the Cassidy loan.

8. One of the Defendants' purposes for failing to truthfully report their liability on the Cassidy loan on their March 1, 1986, financial statements was to hide the true borrowers and purpose of the Cassidy loan.

9. The acts of concealing the true nature of the Cassidy loan permitted Barbara Chaney to submit the loan to the loan committee for extension without detection of its true nature.

10. As a result of the absence of Defendants' liability on the land in the false financial statements, neither the loan committee (with the exception of Barbara Chaney) nor the bank examiners realized that the

Defendants' financial statements, as well as Richard T. Cassidy's financial statement, were untrue.

11. On May 14, 1986, June 27, 1986, and September 30, 1986, subsequent to Defendants' knowing and willful making of a false and fraudulent financial statement to Western Bank, Western Bank did renew and/or extend the June 27, 1985, "nominee" loan to Richard T. Cassidy.

12. Barbara Chaney knew the related nature of the Defendants and the Cassidy loan.

13. The Cassidy loan was made without any financial statement on file for the loan committee's consideration.

14. Had the Defendants' financial statements truthfully reported the $645,000.00 liability, State and Federal bank examiners would have been alerted to the true nominee nature of the Cassidy loan and would have prohibited the extension of the note as violative of the bank's own "loans to one borrower" policy, legal lending limit, and Federal and State regulations prohibiting the same.

15. Had the financial statements been truthful, no extension would have been made of the Cassidy loan and the examiners could have insisted on several remedies in payment on the note.

16. The Defendants continued to benefit from the use of the $645,000.00 loan proceeds as a direct result of the renewal of the Cassidy loan.

CONCLUSIONS OF LAW

1. The amount of restitution ordered in the above-captioned cause of action to be paid by Defendants Lawrence M. Bower, Chris A. Cummings, and George Wallace is based solely upon the loss caused

by the specific conduct that is the basis of the offense of conviction in accordance with *Hughey v. United States*, 495 U.S. 411 (1990) and *United States v. Clark*, 931 F.2d 292 (5th Cir. 1991).

2. On or about March 1, 1986, Defendants Lawrence M. Bower, Chris A. Cummings, and George Wallace knowingly and willfully made false and fraudulent financial statements to Western Bank, prior to Western Bank's renewal and/or extension of the June 27, 1985, "nominee" loan to Richard T. Cassidy.

3. The renewals and/or extensions of the "nominee" loan to Richard T. Cassidy, authorized for the benefit and accommodation of Defendants Chris A. Cummings, Lawrence M. Bower, George Wallace, and their related business entities, and the Cummings Group and ResortAmerica Corporation, were made following the Defendants' knowing and willful making of false and fraudulent financial statements to Western Bank.

4. Defendants made the false statements for the purpose of influencing Western Bank, *inter alia*, in the renewal and/or extension of loans on their behalf – specifically, the Cassidy loan in the amount of $645,000.00. The extended and/or renewed "nominee" loan to Richard T. Cassidy resulted in the a loss to the FDIC in the amount of $1,141,285.00.

SIGNED this 25th day of February, 1994

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE